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TREATY WITH THAILAND ON MUTUAL ASSISTANCE IN CRIMINAL MATTERS

JULY 31 (legislative day, JANUARY 3), 1989.—Ordered to be printed

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Mr. PELL, from the Committee on Foreign Relations, submitted the following

REPORT

together with

ADDITIONAL VIEWS

The Committee on Foreign Relations, to which was referred the Treaty between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

BACKGROUND

The negotiation of mutual legal assistance treaties (MLAT's), treaties designed to obtain evidence from abroad, represents a relatively new development in the area of international law enforcement. Negotiations on the first MLAT began over 17 years ago in response to increasing evidence that Swiss banks were being used to launder and hide organized crime money. In 1973, an MLAT between the United States and Switzerland was signed; it entered into force in 1977. In the first 8 years in force, over 300 requests from the United States had been handled by Swiss authorities. The treaty clearly has been and continues to be of assistance to American officials, but an extensive right of appeal available to those affected by American requests and the Swiss refusal to permit information provided by them to be used in tax evasion prosecutions have rendered the treaty less than a perfect instrument.

Since the MLAT with the Swiss entered into force, MLAT's with the Netherlands, Turkey, and Italy have entered into force, as have

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a number of executive agreements in the same vein with the Cayman Islands, the British Virgin Islands, Montserrat, Anguilla, Turks and Caicos, Haiti, Nigeria, and the United Kingdom. Generally speaking, executive agreements have been limited to narcotics cases and have served as the first step toward agreement on a more expansive mutual assistance treaty. In addition, MLAT's have been negotiated with Colombia and Morocco, but each has been ratified by the United States only. At the present time, MLAT's with Canada, Thailand, the Bahamas, the Cayman Islands, Mexico, and Belgium have been signed but not yet ratified by the United States.

The traditional procedure for obtaining evidence from foreign countries is by the cumbersome, time-consuming, and extremely limited process of letters rogatory, a process whereby written requests from the court of one country to the court of another asking the receiving court to provide evidence or some other form of assistance are made. Letters rogatory have been found lacking in that: (1) They fail to have the element of compulsion; (2) they produce evidence which is inadmissible in the requesting country's courts; and (3) the requested nation often lacks sufficient political will or incentive to comply with the other country's request.

MLAT's are a significantly more effective means of obtaining legal assistance. An MLAT obligates each country to provide evidence and other forms of assistance needed in criminal cases. An MLAT, either by itself or in conjunction with domestic implementing legislation, can provide a means of overcoming bank and business secrecy laws that have in the past so often frustrated the effective investigation of large-scale narcotics trafficking operations. In an MLAT, the United States has the opportunity to include procedures that will permit us to obtain evidence in a form that will be admissible in our courts. Such procedures would include the use of certificates needed to admit foreign business records, or the opportunity for adequate direct and cross-examination of witnesses in depositions taken abroad. Finally, MLAT's are designed to streamline and make more effective the process of obtaining evidence. Each treaty provides for a central authority, the Justice Departments of the two countries, which is responsible for making and executing requests under the treaty.

MLAT's should add an element of standardization and uniformity to criminal procedures worldwide. The ability of criminals to hide the evidence and fruits of their crime will be diminished with the enhancement of the capacity of law enforcement agencies to cooperate across national boundaries in the investigation and prosecution of those crimes.

On March 19, 1986, the United States and the Kingdom of Thailand signed a treaty on mutual legal assistance in criminal matters. This is the United States first treaty on this topic with an Asian country, and reflects United States priorities in combating narcotics trafficking.

PURPOSE

The treaty provides for assistance in investigations (including grand jury proceedings in the United States), prosecutions, and

other proceedings relating to criminal matters. The use of the term "other proceedings" permits the treaty to be invoked in matters where no criminal investigation or prosecution is involved; that is, civil proceedings to forfeit to the government the profits amassed from illegal drug trafficking or racketeering.

The treaty does not require "dual criminality" for cooperation. Assistance may be rendered even when the matter under investigation is not controlled by the Requested State's law.

The kinds of assistance provided for under the treaty include but are not necessarily limited to: Taking testimony and statements; obtaining documents, records and evidence; executing requests for searches and seizures; initiating proceedings upon request; and assistance in proceedings related to forfeiture.

Committee Comments

The committee believes that Mutual Legal Assistance Treaties (MLAT's) are a key element in the U.S. strategy to improve international cooperation against crime, particularly narcotics-related offenses such as RICO, CCE, and money laundering. The treaty with Thailand is our first with an Asian country, and offers opportunity to strengthen our efforts to stem narcotics flows from Southeast Asia's golden triangle through Thailand.

During committee consideration of the treaty with Thailand, as well as the other five pending MLAT's, concern was expressed that the bilateral treaties could in some manner abridge the constitutional rights of United States citizens. A reservation was proposed to each of the MLAT's asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

The U.S. Supreme Court, in its own words, "has regularly and uniformly recognized the supremacy of the Constitution over a treaty," *Reid* v. *Covert,* 354 U.S. 1, (1957). Thus, the committee viewed the proposed reservation as unnecessary. As a matter of domestic law, the Constitution necessarily circumscribes the Government's authority to act, and the courts could invalidate any unconstitutional action taken pursuant to the treaties whether or not such reservation were included in the instrument of ratification.

None of the MLAT's requires or authorizes legislation or other action which is prohibited by the Constitution, nor could they properly do so. The reservation thus adds nothing in the way of constitutional protection.

In addition, our treaty partners might well object because it is passed as a reservation with respect to our intended implementation of the treaty and will be expressly included in the instrument of ratification. Each of our treaty partners would have to accept it. Some of the pending six might not, and others with whom the United States wants to negotiate in the future may decline to do so if such a reservation is added at the time of ratification. More likely, some might insist on adding a reciprocal reservation, and that could limit the usefulness of the treaty for our purposes since constitutional limitations have different effects in different legal systems.

The reservation also raises dangerous litigation risks. It could provide a target for defendants as well as the targets of investigations to interpose specious challenges to MLAT requests where they could not now do so. They could also in effect substitute the actions of a foreign government for our own constitutional requirements when they carry out an MLAT request in their own country by permitting defendants to move to exclude evidence produced under an MLAT request because the procedure followed by the foreign government did not comport with those required by the Constitution.

Finally, the reasons why a similar reservation was adopted with regard to the Genocide Convention are inappropriate here. Unlike the Genocide Convention, the MLAT's do not create new grounds for which U.S. citizens can be tried. Instead, they establish mechanisms by which evidence can be obtained overseas in a form admissible in U.S. courts through such means as service of process, taking of testimony, admission of documentary evidence such as bank records, and the execution of requests for searches and seizures.

These are essentially procedural matters, already well regulated by the courts. In roughly a decade's experience under the existing MLAT's, no significant constitutional questions have arisen that would require inclusion of the reservation.

Finally, concern was raised that defendants in criminal cases are explicitly excluded from use of the Mutual Legal Assistance Treaties. The committee notes that nothing in this treaty is intended to negate the authority of the Court to ask the prosecution to make requests for information under the treaty.

COMMITTEE ACTION

100TH CONGRESS

On April 20, 1988, the committee held its first hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was heard from Administration witnesses, Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Mark M. Richard, Deputy Assistant Attorney General, Criminal Division, Department of Justice.

On June 14, 1988 the committee held another hearing at which the following public witnesses presented testimony: Mr. Bruce Zagaris, Attorney, Berliner & Maloney, Washington, DC; Mr. Robert L. Pisani, Executive Director, International Legal Defense Counsel, Philadelphia, PA; Mr. Philip White, Attorney, Adam, McCullough & Beard, Washington, DC.

The committee met to consider the Treaty between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance on September 27, 1988. Senator Helms offered a reservation to each of the pending treaties asserting that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was defeated by a 3 to 15 vote with Senators Helms, Pressler, and Trible voting in

the affirmative and Senators Pell, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Adams, Moynihan, Lugar, Kassebaum, Boschwitz, Murkowski, Evans, and McConnell voting in the negative.

The committee voted by voice vote with a quorum present to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent.

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On April 18, 1989, the committee held a hearing on the six treaties relating to mutual legal assistance in criminal matters with the Cayman Islands, Mexico, Canada, Belgium, the Bahamas, and Thailand. Testimony was given by Mary V. Mochary, Principal Deputy Legal Adviser, Department of State, and Edward Dennis, Assistant Attorney General, Criminal Division, Department of Justice.

On May 2, 1989, Commissioner William von Raab of the U.S. Customs Service testified before the committee on the mutual legal assistance treaties and other matters. The complete hearing record on this treaty as well as the other five MLAT's is printed as an appendix to the committee report on the treaty with the Cayman Islands (Treaty Doc. 100–8).

The committee met to consider the Treaty between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters on July 25, 1989. Senator Helms offered a reservation to each of the pending treaties stating that "nothing in this treaty requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." The Helms reservation to all the treaties was rejected by a vote of 2 to 15 with Senators Helms and Pressler voting in the affirmative and Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, Robb, Lugar, Kassebaum, Boschwitz, McConnell, and Mack voting in the negative.

The committee voted 18 to 1 to report favorably the treaty with a resolution of ratification to the Senate for its advice and consent. Ayes: Senators Pell, Biden, Sarbanes, Cranston, Dodd, Kerry, Simon, Sanford, Moynihan, Robb, Lugar, Kassebaum, Boschwitz, Pressler, Murkowski, McConnell, Humphrey, and Mack. Nays: Senator Helms.

Section-by-Section Analysis

The following technical analysis, which was prepared by the U.S. negotiating team, constitutes the formal executive branch representation as to the meaning of this treaty and the obligations to be assumed by the United States under it:

TECHNICAL ANALYSIS OF THE MUTUAL LEGAL ASSISTANCE TREATY BETWEEN THE UNITED STATES OF AMERICA AND THE KINGDOM OF THAILAND

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Technical Analysis of the Mutual Legal Assistance Treaty Between the United States of America and the Kingdom of Thailand

On March 19, 1986, the United States and the Kingdom of Thailand signed a treaty on mutual legal assistance in criminal matters hereinafter "treaty"). This is the United States' first treaty on this topic with an Asian country, and it is expected to be a valuable instrument in the fight against international crime, especially drug trafficking.

A technical analysis of the treaty, prepared by the United States delegation which negotiated it, follows.

Article 1 – Obligation to Assist

The first article of the treaty, like the opening provision in other United States mutual legal assistance treaties,[1] provides for assistance in investigations, prosecutions, and other proceedings relating to criminal matters.

Both delegations agreed that the term "investigations" includes grand jury proceedings in the United States. The term "other proceedings" is used to permit the treaty to be invoked in matters where no criminal investigation or prosecution is involved. For instance, proceedings to forfeit to the government the profits amassed from illegal drug trafficking or racketeering sometimes are civil in nature.[2] Similarly, proceedings to disbar a lawyer

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[1] Treaty Between the United States and the Swiss Confederation on Mutual Assistance in Criminal Matters, signed at Bern May 25, 1971, 27 UST 2019, TIAS 8302 (entered into force Jan. 23, 1977)(hereinafter "U.S.-Swiss Treaty"); U.S.-Turkey Treaty on Extradition and Mutual Assistance in Criminal Matters, signed at Ankara June 7, 1979, 32 UST 311, TIAS 9891 (entered into force Jan. 1, 1981)("U.S.-Turkey Treaty"); U.S.-Netherlands Treaty on Mutual Assistance in Criminal Matters, signed at the Hague June 12, 1981, TIAS 10734 (entered into force Sept. 15, 1983)("U.S.-Netherlands Treaty"); U.S.-Colombia Mutual Legal Assistance Treaty, signed at Washington Aug. 20, 1980, ratification advised by the Senate Dec. 2, 1981 and instrument of ratification signed by the President Jan. 4, 1981 (not yet ratified by Colombia)("U.S.-Colombia Treaty"); U.S.-Italy Mutual Legal Assistance Treaty, signed at Rome Nov. 9, 1982, TIAS ____ (entered into force Nov. 13, 1985)("U.S.-Italy Treaty"); U.S.-Morocco Convention on Mutual Assistance in Criminal Matters, signed at Rabat October 10, 1983, ratification advised by the Senate June 28, 1984 and instrument of ratification signed by the President July 13, 1984 (not yet ratified by Morocco)("U.S.-Morocco Treaty"); U.S.-Canada Treaty on Mutual Assistance in Criminal Matters, signed at Quebec City March 19, 1985 ("U.S.-Canada Treaty"); and Mutual Legal Assistance Treaty between the United States and the United Kingdom concerning the Cayman Islands, signed at George Town July 3, 1986 ("U.S.-Cayman Treaty"). See also U.S.-Bahamas Treaty on Mutual Assistance in Criminal Matters, signed at Nassau by the Bahamas on June 12, 1987, and by the United States on August 18, 1987; U.S.-Mexico Treaty on Cooperation for Mutual Legal Assistance, signed at Mexico City December 9, 1987; and U.S- Belgium Treaty on Mutual Legal Assistance in Criminal Matters, signed at Washington January 28, 1988.

[2] Title 21, United States Code, § 881; Title 18, United States Code, § 1964.

convicted of defrauding his clients or lending assistance to an illegal narcotics trafficking organization would be administrative in nature, but clearly would be related to the criminal conduct. It is intended that such proceedings fully qualify as bases for requests under the treaty.

The second paragraph of the article lists the major types of assistance specifically considered by the negotiators of the treaty. The items listed in this paragraph are described in further detail in subsequent articles. However, the list is not intended to be exclusive, as is indicated by the words "include but not limited to" in the opening clause of the paragraph.

Extradition treaties sometimes condition the surrender of fugitives upon a showing of "double criminality," i.e., proof that the facts underlying the offense charged in the Requesting State would also constitute an offense in the Requested State. The third paragraph of this article makes clear that there is no requirement of "double criminality" for cooperation under this treaty, and assistance maybe rendered even when the matter under investigation is not controlled by the Requested State's law. This paragraph is important because Thai and United States laws differ significantly, and the double criminality rule would render assistance unavailable in many significant areas. For instance, Thailand has no exact counterpart to the United States laws on conspiring to traffic in drugs, an area of criminal activity in which assistance under the treaty is especially important to us.[3]

The fourth paragraph makes it clear that the provisions of the treaty set forth the rights and obligations between the Governments of the United States and of Thailand, and that the treaty's is not intended to be utilized by nongovernmental parties or institutions. Thus, private parties, such as litigants in civil proceedings not involving the government, may not invoke the treaty to obtain assistance or seek evidence for use in solely private matters. This is consistent with other United States mutual legal assistance treaties,[4] and reflects the fact that the purpose of this treaty is to enhance the effectiveness of the criminal law enforcement authorities, and not to provide an alternative method of evidence gathering for others. Private litigants in the United States may continue to seek evidence in Thailand by letters rogatory, an avenue of international assistance which this treaty leaves

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[3] For example, during the negotiations it was also noted that the United States laws on insider trading have no exact counterpart in Thailand, and Thai currency control legislation has no exact match in United States law.

4 See, generally, Ellis and Pisani, United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis, 19 Int'l Lawyer 189, 211 (1985).

undisturbed.

The fifth paragraph states that the provisions of the treaty are not intended to create any right to impede execution of requests, or suppress or exclude evidence obtained thereunder. Thus, a person from whom records are sought would not be free to oppose the execution of the request by claiming that it does not comply with the treaty's formal requirements such as those specified in Article 4, or the substantive requirements set out in Article 2, rather than by relying on the regular legal rules in the Requested State (e.g., a claim that the record is privileged). Therefore, any evidence obtained by the United States from Thailand under the treaty should not be suppressed or excluded on the allegation that the United States' request somehow failed to comply with the provisions of the treaty. This is a standard provision in United States mutual legal assistance treaties.[5]

The final paragraph of the article states that the treaty does not apply to military offenses or to the execution of arrest warrants. The prohibition against assistance in cases involving military offenses was proposed by the Thai delegation,[6] and is quite similar to Article 1 of the European Convention on Mutual Assistance in Criminal Matters,[7] and to a provision in Thailand's recently negotiated mutual legal assistance treaty with France. The prohibition against assistance in the execution of arrest warrants is also based on Article 1 of the European Convention, and is intended to emphasize the fact that Article 12 of this treaty, concerning transfer of persons in custody for testimonial purposes, is neither intended nor expected to create an alternative method for acquiring custody over offenders wanted in the Requesting State for trial. The terms of the applicable extradition treaty control such matters.

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[5] Ellis and Pisani, supra, note 4, pp. 211-212, 221-222. See also United States v. Johnpoll, 739 F.2d 702 (2nd Cir 1984).

[6] It therefore differs from most of our other mutual legal assistance treaties, under which assistance is discretionary if the investigation or case involves a military offense. Thai authorities insisted on this provision in order to maintain consistency with the terms of their mutual legal assistance treaties with other countries.

[7] European Treaty Series No. 30, entered into force June 12, 1962 (hereinafter "European Convention").

Article 2 --Limitations on Assistance

Article 2 specifies the limited classes of cases in which assistance may be denied under the treaty.

Article 2(1)(a) permits the Central Authority of the Requested State to deny a request if execution of the request would prejudice the sovereignty, security or other essential national interests of that State. This would include cases where assistance might involve disclosure of information which is classified for national security reasons. It is anticipated that the Department of Justice, in its role as Central Authority for the United States,[8] would work closely with the Department of State, the Department of Defense, and the Central Intelligence Agency, and other interested government agencies in determining whether to execute a request which might fall in this category. Article 2(1)(b) permits the Requested State to deny the request if it relates to a political offense. These restrictions are similar to those found in other mutual legal assistance treaties, and generally follow the exclusions found in Article 3 of the new extradition treaty between the United States and Thailand signed at Washington December 14, 1983.

Article 2(2) permits the Requested State to impose appropriate conditions on its assistance in lieu of denying a request outright pursuant to the first paragraph of the article. For example, a State might request information which could be used either in a routine criminal case (which would be within the scope of the treaty) or in a political prosecution (which would fall outside the treaty). This paragraph would permit the Requested State to provide the information on the condition that it be used only in the routine criminal case. Naturally, the Requested State would notify the Requesting State of any proposed conditions before actually delivering the evidence in question, thereby according the Requesting State an opportunity to indicate whether it is willing to accept the evidence subject to the conditions. If the Requesting State does accept the evidence, it must respect the conditions specified by the Requested State with respect to the evidence.

Article 2(3) states that a request for assistance need not be executed immediately if execution would interfere with an ongoing investigation, prosecution, or proceeding in the Requested State. It is understood that the Central Authority of the Requested State will determine when to apply this provision. The Central Authority of the Requested State may, in its discretion, take such preliminary action as deemed advisable to obtain or preserve evidence which might otherwise be lost before the conclusion of the investigation or legal proceeding taking place in that State. If this is done, the

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[8] See Article 3, infra.

Requesting State should not be seriously disadvantaged by having to wait until the conclusion of the proceedings in the Requested State.

Article 2(4) effectively requires that the Central Authority of the Requested State promptly notify the Central Authority of the Requesting State of the reason for denying or postponing execution of a request. This ensures that when a request is only partly executed, the Requested State will provide some explanation for not providing all of the information or evidence sought. This should eliminate misunderstandings which can arise in the operation of the agreement, and enable the Requesting State to better prepare its requests in the future.

Article 3 – Central Authorities

Article 3 of the treaty provides that each party designate a "Central Authority" for transmission, reception, and handling of treaty requests. The Central Authority of the United States would make all requests to Thailand on behalf of federal agencies, state agencies, and local law enforcement authorities in the United States. The Thai Central Authority would make all requests emanating from its officials. The Central Authority of the Requesting State will exercise some discretion as to the form and content of requests, and as to the number and priority of requests as well.

The second paragraph of the article provides that the Attorney General will be the Central Authority for the United States, as is the case under all other United States mutual legal assistance treaties. The Attorney General has delegated his duties as Central Authority under mutual assistance treaties to the Assistant Attorney General in charge of the Criminal Division, pursuant to 28 C.F.R. § 0.64-1.[9] Paragraph 3 specifies that the Central Authority for Thailand is the Minister of the Interior or his designee. In Thailand it is the Minister of Interior who oversees the criminal law enforcement activities of Thai prosecutors and police.

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[9]The Assistant Attorney General for the Criminal Division has in turn redelegated his authority to the Deputy Assistant Attorney General and to Director of the Criminal Division's Office of International Affairs, in accordance with the regulation. Directive No. 81, 44 FR 18661, March 29 1979, as amended at 45 FR 6541, January 29, 1980; 48 FR 54595, December 6, 1983.

Article 4 -- Form and Contents of Request

Article 4 is similar to Article 29 of the United States-Swiss Treaty, which, in turn, is based on Article 14 of the European Convention on Mutual Assistance in Criminal Matters.

The first paragraph requires that requests be in writing, in the language of the Requested State. It is anticipated that the Central Authorities will agree between themselves on a standard format for such requests.

Article 4(2) lists information which is deemed crucial to efficient operation of the treaty, and so must be included in each request. Article 4(3) outlines kinds of information which is important but not crucial, and should be provided "when appropriate."

In keeping with the intention of the parties that requests be as simple and straightforward as possible, there is no requirement under the treaty that a request be legalized or certified in any particular manner. However, Article 4(1) does require that documents accompanying the request be translated into the language of the Requested State, and that the translation be certified by a sworn or approved translator.[10] During the negotiations, it was agreed that certification by the Department of State will suffice when the request is from the United States.

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[10] One example of the kind of document which might accompany a request would be a subpoena transmitted for service under Article 10 of the treaty.

Article 5 -- Execution of Requests

The first paragraph of Article 5 obliges each Party to undertake diligent efforts to execute a request promptly. The treaty contemplates that the Central Authority which receives a request will first review the request and immediately notify the Central Authority of the Requesting State if it is of the opinion that the request does not comply with the treaty's terms. If the request does satisfy the treaty's requirements and the assistance sought can be provided by the Central Authority itself, that Authority will comply with the request without delay. It the request requires action by some other agency in the Requested State, the Central Authority of that State will see to it that the request is promptly transmitted to the correct agency for execution, and take responsibility for insuring a prompt response.

Where the United States is the Requested State, it is anticipated that the Central Authority will transmit most requests from Thailand to federal investigators, prosecutors, or judicial officials for execution. However, a request may be transmitted to state officials for execution if the Central Authority deems it more appropriate to do so. The second sentence of the first paragraph authorizes and requires the federal, state, or local agency or authority selected by the Central Authority to take whatever action would be necessary and within its power to execute the request.

This provision is not intended or understood to authorize the use of the grand jury in the United States for the collection of evidence pursuant to a request from Thailand. Rather, it is anticipated that when a request from Thailand requires compulsory process for execution, in most cases the Department of Justice would ask a federal court issue the necessary process or court order under Title 28, United States Code, § 1782 and the provisions of this treaty. [11]

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[11] One court has interpreted Title 28, United States Code, § 1782 as permitting the execution of a request for assistance from a foreign country only if the evidence sought is for use in proceedings before an adjudicatory "tribunal" in the foreign country. In Re Letters Rogatory Issued by the Director of Inspection of the Government of India, 385 F.2d 1016 (2nd Cir. 1976); Fonseca v. Blumenthal, 620 F.2d 322 (2nd Cir. 1980). This rule poses an unnecessary obstacle to the execution of requests concerning matters which are at the investigatory stage, or which are customarily handled by administrative officials in the Requesting State. The second sentence of this paragraph specifically authorizes United States courts to issue subpoenas and other process to satisfy a request under the treaty. Since the treaty permits requests to be made in connection with matters not within the jurisdiction of a

Article 5(2) states that when execution of the request entails action by a judicial or administrative agency, the Central Authority of the Requested State shall present the request to that court or agency at no cost to the Requesting State. Since the cost of retaining counsel abroad to present and process letters rogatory is sometimes quite high, this provision for reciprocal legal representation should be a significant advance in international legal cooperation. It is understood that should the Requesting State choose to hire private counsel in connection with a particular request, it is free to do so.

Article 5(3) is critically important. This paragraph provides that all requests shall be executed in accordance with the laws of the Requested State, and except as otherwise provided by the treaty; it thereby makes it clear that neither State is expected to take any action pursuant to a treaty request which would be prohibited under its internal laws. For the United States, the treaty is intended to be self-executing, and no new or additional legislation is needed to carry out the obligations undertaken here.

The paragraph also requires that procedures specified in the request shall be followed in the execution of the request so long as those procedures are not incompatible with the law in the Requested State. This provision is necessary for two reasons.

First, there are significant differences between the procedures which must be followed by United States and Thai authorities in collecting evidence in order to assure the admissibility of that evidence at trial. For instance, United States law permits documentary evidence taken abroad to be admitted in evidence if the evidence is duly certified and the defendant has been given a fair opportunity to test its authenticity.[12] Thai law currently contains no similar provision. Thus, documents assembled in Thailand in strict conformity with Thai evidentiary procedures might not be admissible in United States courts. Similarly, United States courts frequently employ procedural techniques such videotape depositions to enhance the reliability of evidence taken abroad, and some of these techniques, while not forbidden, are simply not used in Thailand in connection with Thai investigations.

Second, the evidence in question could be needed for subjection to forensic examination, and sometimes the procedures which must be followed to enhance the scientific accuracy of such tests do not coincide with those

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adjudicatory "tribunal" in Thailand, this paragraph accords the courts slightly broader authority than § 1782, as interpreted in the India and Fonseca cases.

[12] Title 18, United States Code, § 3505.

utilized in assembling evidence for admission into evidence at trial. The value of such forensic examinations could be significantly lessened -- and the Requesting State's investigation could be retarded -- if the Requested State were to insist unnecessarily on handling the evidence in a manner usually reserved for evidence to be presented to its own courts.

Both delegations agreed that the treaty's primary goal of enhancing law enforcement in the Requesting State could be frustrated if the Requested State were to insist on producing evidence in a manner which renders the evidence inadmissible or less persuasive in the Requesting State. For this reason, Article 5(3) requires the Requested State to follow the procedure outlined in the request to the extent that it can, even if the procedure is not that usually employed in its own proceedings. However, if the procedure called for in the request is incompatible with the law in the Requested State (as opposed to simply unfamiliar there), the procedures of the Requested State will be utilized.

Article 6 - Costs

Article 6 reflects the basic premise that the Requested State should bear all costs relating to execution of the request, with three exceptions. The Requesting State must pay for (1) any expert witness whose services it has requested,[13] (2) the travel expenses and other costs incurred in transferring persons in custody to it pursuant to Article 12, and (3) the travel costs of witnesses who voluntarily travel to the Requesting State pursuant to Article 16.

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[13] The article refers only to the fees of expert witnesses because in Thailand, as in many other countries, fact witnesses receive no fee of any kind when testifying in criminal proceedings.

Article 7 --Limitations on Use

Article 4 states that the Requesting State must specify the reason why it needs the information or evidence sought under the treaty. Accordingly, the first paragraph of Article 7 requires that information provided under the treaty will not be used for any purpose other than that stated in the request without the consent of the Central Authority of the Requested State.

Once information obtained under the treaty has been revealed to the public in a trial, that information effectively becomes part of the public domain. The information is likely to become a matter of common knowledge, perhaps even cited or described in the press. When that occurs, it is practically impossible for the Central Authority of the Requesting State to continue to block the use of that information by third parties or other government agencies. Therefore, some United States mutual legal assistance treaties permit evidence obtained under the treaty to be used for any purpose after it has become public in a trial resulting from the proceedings described in the request.[14] The negotiators of this treaty recognized this fact, and it was agreed that once evidence has been made public the strictures of Article 7(1) will not apply.

It is anticipated that some United States requests for assistance may contain information which under our law must be kept confidential. For example, it may be necessary to set out information which is ordinarily protected by Rule 6e, Federal Rules of Criminal Procedure, in the course of an explanation of "the subject matter and nature of the investigation, prosecution, or proceeding," as required by Article 4(2)(b). Therefore, Article 7(2) enables the Requesting State to call upon the Requested State to keep the information in the request confidential.[15] If the Requested State cannot execute the request without disclosing the information in question (as may be the case if execution requires a public judicial proceeding in the Requested State), or for some reason this confidentiality cannot be assured, the treaty obliges the Requested State to say so, thereby giving the Requesting State an opportunity to withdraw the request rather than risk jeopardizing its investigation or proceeding by disclosure of the information.

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[14] See Article 11(3) of the U.S.-Canada Treaty.

[15] It is thus similar to Article 8(2) of the U.S.-Italy Treaty, and Article 7(2) of the U.S.-Cayman Islands Treaty.

The third paragraph of Article 7 permits the State which has received a request for evidence to provide the evidence on the condition that it be kept confidential. For example, the Requested State could insist that the Requesting State limit access to information which could endanger the safety of an informant, or unduly prejudice the interests of a person not connected in any way with the matter being investigated in the Requesting State. The provision also provides for the imposition of conditions of confidentiality required by the law in the Requested State. For instance, information obtained from a grand jury in the United States might be provided to Thai authorities only upon agreement by the latter to maintain the same degree of secrecy to which the information would be entitled in the United States. As in most United States mutual legal assistance treaties, conditions of confidentiality are to be imposed only when necessary, and should be tailored to fit the circumstances of each particular case.[16]

There is some question whether the Sixth Amendment to the United States Constitution would permit the United States to honor a confidentiality requirement imposed by Thailand on evidence which may be favorable to the accused.[17] Moreover, the purpose of the treaty is the production of evidence for use at trial, and that purpose would be frustrated if the Requested State could let the Requesting State see valuable evidence but impose confidentiality restrictions which prevent the Requesting State from using the evidence. Therefore, the obligation to abide by confidentiality restrictions contains a narrow exception, permitting revelation of the evidence if necessary in a public trial resulting from the investigation, prosecution, or proceeding cited in the request. In cases where Thailand has been obliged to impose a confidentiality restriction on evidence turned over to the United States, it is anticipated that the United States will seek a protective order limiting access to the information.[18]

It should be recalled that under Article 1(3), the restrictions outlined in Article 7 are for the protection of the parties to the treaty -- the United States and Thai governments -- and the enforcement of these provisions is left entirely to the governments. Where any individual alleges that an authority

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[16] See Article 11(1) of the U.S.-Netherlands Treaty, Article 8(2) of the U.s.-Colombia Treaty, Article 18(1) of the U.s.-Italy Treaty, Article 7(i) of the U.S.-Morocco Treaty, and Article 9(1) of the U.S.-Canada Treaty.

[17] Brady v. Maryland, 273 US 33 (1963).

[18] Exchange of letters dated May 25,1971, with respect to Article 15 of the Swiss Treaty.

in the United States is seeking to use information or evidence obtained from Thailand in a manner inconsistent with this article, the recourse would be for the person to inform the Central Authorities of Thailand and the United States of the allegations, for consideration only as matter between the governments. If any of the Parties believe that the allegations require explanation, it may make an appropriate inquiry.

Article 8 – Taking Testimony and Producing Evidence in the Territory of the Requested State

Article 8(1) provides that the Requested State shall compel a person within its jurisdiction to testify or the produce documents, records, or articles needed as evidence in the Requesting State "in the same manner and to the same extent" as in criminal proceedings in the Requested State. The compulsion contemplated by this article can be accomplished by subpoena or any other means available under the law of that country.

During the negotiations, the Thai authorities drew a distinction between a witness supplying "testimony" and a "statement." The former could be supplied only in a formal proceeding before a Thai tribunal, with a Thai judge posing the questions.[19] The latter could be given in less formal proceedings before the persons designated in the United States request.

Both delegations agreed that Article 8(1), read together with Article 5(3), insures that no person will be compelled to furnish information if he has a right not to do so under the law of the Requested State. Thus, a witness questioned in the United States pursuant to a treaty request from Thailand is guaranteed the right to invoke any of the testimonial privileges (such as attorney client privilege, interspousal privilege, etc.) usually available in proceedings here, as well as the constitutional privilege against incrimination.[20] Of course, a witness testifying in Thailand may raise any of the similar privileges available under Thailand law.

Since the law is unclear on the extent to which a person in one country may stand on a privilege available only under the law of a foreign country, the treaty neither requires nor forbids the recognition in the Requested State of privileges existing only in the law of the Requesting State However, Article 8(2) does require that in cases in which a witness attempts to assert a privilege unique to the Requesting State, the authorities in the Requested State will take the desired evidence and turn it over to the Requesting State along with notice that it was obtained over a claim of privilege. The applicability of the privilege can then be determined in the Requesting State,

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[19] The United States prosecutor or defense counsel would be free to suggest questions to the Thai judge to ask.

[20] This is consistent with the approach taken in Title 28, United States Code, § 1782.

where the scope of the privilege and the legislative and policy reasons underlying it are best understood.[21] A similar provision appears in many of our recent mutual legal assistance treaties.[22]

The third and fourth paragraphs provide that any interested parties, including the defendant and his counsel, may be permitted to be present and pose questions during the taking of testimony under this article.

Article 8(5) states that business records produced pursuant to the treaty may be authenticated by having the person in charge of maintaining them -- presumably the custodian of the records or some other qualified person -- complete a certification in a specified form. A model of the form is appended to the treaty. Thus, the provision establishes a procedure for authenticating foreign records in a manner essentially similar to that followed in 18 U.S.C. § 3505.

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[21] Cf. R. & J. Dick Co. v. Bass, 295 F. Supp. 758 (N.D. Ga. 1966); Reg. v. Rathbone, Ex p. Dikko [1985] 2 W.L.R. 375.

[22] See U.S.-Netherlands Treaty Article 5(1); U.S.-Colombia Treaty Article 9(1); U.S.-Italy Treaty Article 14(6); U.S. - Morocco Treaty Article 8(2); and U.S.-Cayman Islands Treaty Article 8(2).

Article 9 – Providing Records of Government Offices or Agencies

Article 9 provides for access to government records and other forms of documentary information. It is anticipated that the kinds of government information which will be most commonly sought will include documents from the files of the police or other investigative authorities. It is anticipated that Thai requests for United States government documents will generally fall in the same category.

The first paragraph obliges each State to furnish to the other copies of publicly available records of a government office or agency in its territory. The term "government office or agency" includes executive, judicial, and legislative units at the federal, state, and local level in either State.

The second paragraph provides that the Requested State "may" share with its treaty partner copies of nonpublic information in government files. The obligation under this provision is discretionary. Moreover, the Requested State may only utilize its discretion to turn over information in its files "to the same extent and under the same conditions" as it would to its own law enforcement or judicial authorities. It is the intention of the negotiators that the Central Authority of the Requested State determine what that extent and what those conditions would be.

The discretionary nature of this provision was deemed necessary because government files in each State contain some kinds of information which would be available to investigative authorities in that State, but which would justifiably be deemed inappropriate to release to a foreign government. For example, assistance might be denied under this provision would be where the information requested would identify or endanger an informant, prejudice sources of information needed in future investigations, or reveal information which was made available to the Requested State in return for a promise that it not be divulged to anyone. Of course, if the disclosure of the information is barred by the law in the Requested State, that, too, would be a reason for denying the request under this provision.

The third paragraph of Article 9 states that documents provided under this article will be authenticated pursuant to a certificate in a form appended to the treaty. Thus, the treaty establishes a procedure for authenticating foreign official records by certificate, in a manner essentially similar to Rule 902(3), Federal Rules of Evidence.[23]

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[23]Cf. United States v. Leal, 509 F. 2d 122 (9th Cir. 1975).

This article speaks in terms of the Requested State providing copies of government records, but the negotiators agreed that the Requested State would not be precluded from delivering the original of the records, upon request, if the law in the Requested State permits it and it is useful to do so.

Article 10 -- Service of Documents

Article 10 creates an obligation on the part of the Central Authority of the Requested State to arrange for or effect the service of any legal document, such as summons, complaints, or subpoenas, at the request of the Central Authority of the other State. This provision does not limit or restrict any other means of extraterritorial service of process provided for in Thai or United States law, a fact which is underscored by Article 19.

It is expected that when the United States is the Requested State, service under the treaty will be made either by registered mail (in the absence of any request by Thailand to follow any specified procedure for service), or by the United States Marshal's Service in instances where personal service is requested.

The article also states that where the document to be served calls for the appearance of a person in the Requesting State the document must be transmitted by the Requesting State to the Requested State a reasonable time before the scheduled appearance. Thus, if the United States were to ask Thailand to serve a subpoena issued pursuant to Title 28, United States Code, § 1783, the request would have to be submitted well in advance of the hearing or trial at which the respondent is expected to appear. This is to allow sufficient time for service to be effected and for the respondent to make arrangements for his appearance. It is anticipated that the Central Authorities will agree between themselves upon guidelines for the smooth implementation of this provision.

The United States delegation fully expected that this article would be used primarily to facilitate service of subpoenas on United States citizens in Thailand, pursuant to 28 U.S.C. § 1783. However, the Thai authorities were concerned that the wording of the article could permit service of subpoenas on Thai citizens as well, and might to oblige Thai citizens to travel to the United States in response to such subpoenas. They felt that this would be an undesirable derogation from Thai sovereignty. Therefore, the fourth paragraph specifically states that no civil or criminal forfeiture or legal sanction, measure, or restraint can be applied to any person other than a national of the Requesting State for failure to appear in response to a document served under this article.

Article 11 - Search and Seizure

It is sometimes in the interests of justice for one state to ask another to search for, secure, and deliver articles or objects needed in the former country for use as evidence or for other purposes. United States courts can and do execute such requests now under Title 28, United States Code, § 1782.[24] Article 11 of the treaty creates a formal framework for handling such a request in either country.

The article requires that the search and seizure request include "information justifying that action under the laws of the Requested State." This means that normally a request to the United States from Thailand will have to be supported by probable cause for the search. A United States request to Thailand would have to satisfy the corresponding evidentiary standard there.[25] It is contemplated that the request would be carried out in strict accordance with the law of the country in which the search is being conducted.

The second paragraph of the article is designed to insure that a record is kept of articles seized and of articles delivered up under the treaty. This provision effectively requires that detailed and reliable information regarding the condition of the article at the time of seizure, and the chain of custody between seizure and delivery to the Requesting State.

The article also requires that the certificates prepared for this purpose will be admissible without additional authentication at trial in the Requesting State. This is important because the smooth operation of the treaty requires minimizing the burden, expense, and inconvenience to the Requested State of having to send its law enforcement officers to the Requesting State to provide authentication and chain of custody testimony each time evidence produced pursuant to this article is used. The requirement that the certificates be admissible without additional authentication at trial leaves the

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[24] See e.g., United States Ex Rel Public Prosecutor of Rotterdam, Netherlands v. Richard Jean Van Aalst, Case No 84-67-Misc-018 (M. D. Fla, Orlando Div.), cited in Ellis and Pisani, supra, note 4, at 215 (1985).

[25] Article 269 of the Thai Criminal Code requires a showing of reasonable grounds to believe that an offense has been committed before a search warrant may be issued. Thus, the Thai legal standard seems to be quite similar to our own.

trier of fact free to disregard the certificate if there is some other reason to do so aside from authenticity.

Article 12 - Transferring Persons in Custody for Testimonial Purposes

In some recent criminal cases, a need has arisen for the testimony at trial in the United States of a witness serving a sentence in Thailand.[26] In such instances, it could be very helpful if Thai authorities could "lend" the witness to the United States Government, which would see to the witness' security while in the United States and return him to Thailand at the conclusion of his testimony. At the same time, the United States occasionally receives requests from foreign governments for similar assistance, and in one or two cases we have been able to arrange for federal inmates to be transported to foreign countries to assist in criminal proceedings there.[27] Article 12(1) provides a legal basis for cooperation between the United States and Thailand in these matters. The paragraph is based on Article 26 of the U.S.-Swiss Treaty, which is in turn based on Article 11 of the European Convention.

There have also been recent situations in which a person in custody in the United States in a criminal matter has demanded permission to travel to another country to be present at a deposition being taken there in connection with the case.[28] These demands are often denied by the foreign country involved, and it was not the intention of the negotiators to interfere in any way with each party's unfettered discretion to accede to or deny such requests.

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[26]See, e.g., United States v. Sines , 761 F. 2d 434 (9th Cir., 1985).

[27]For example, on January 23, 1986, federal prisoner Edward Hayes Ward was temporarily released from the federal Correctional Institution at Talladega, Florida, to travel to Nassau, the Bahamas, and testify for the Government there at a preliminary inquiry in the case of Commissioner of Police v. George Smith and Everette Bannister, Case No. 4948-85. Ward was accompanied by DEA agents, who saw to his security and insured his prompt return to custody when his testimony was no longer needed.

Similarly, on September 13, 1986, the Justice Department and the Drug Enforcement Administration arranged for four federal prisoners to be transported to the United Kingdom to testify for the Crown in the case of Regina v. Dye, Williamson, Ellis, Davies Murphy, and Millard, a major narcotics case in Central Criminal Court -- "the Old Bailey" -- in London.

[28]See United States v. Sines, supra, note 25; cf. United States v. Iohnpoll, supra note 5; United States v. King, 552 F. 2d 833 (9th Cir. 1976).

The second paragraph of the article provides one legal basis for handling some of these situations.

The third paragraph provides express authority for the Receiving State to maintain the person in custody throughout his stay there, unless the other State specifically authorizes release. The paragraph also authorizes the receiving State to return the person in custody to the other State as soon as circumstances permit, or as otherwise agreed. The transfer of a prisoner under this article requires the consent of the person involved and of both countries, but the provision does not require the prisoner to consent again to his return to the Party where the transfer began.

Once the receiving State has agreed to assist the sending State's investigation or proceeding pursuant to this article, it would be inappropriate for the receiving State to require full-c ess extradition proceedings before allowing him to return to the sending State as agreed. Therefore, Article 12(3)(c) states that extradition proceedings will not be required before the status quo is restored by the return of the person transferred.

Article 13 – Locating Persons

Article 13 obliges the Requested State to take "all necessary measures" to locate persons (such as witnesses, potential defendants, or experts) believed to be located in that State and who are needed in connection with an investigation, prosecution, or proceeding covered by the treaty. This is a standard provision contained in all of our mutual legal assistance treaties.[29]

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[29] See Article 11 of the U.S.-Swiss Treaty, Article 37 of the U.S.-Turkey Treaty, Article 2 of the U.S.-Netherlands Treaty, Article 17 of the U.S.-Colombia Treaty, Article 10 of the U.S.-Italy Treaty, Article 14 of the U.S.-Morocco Treaty, Article 10 of the U.S.-Canada Treaty, and Article 14 of the U.S.-Cayman Islands Treaty.

Article 14 -- Initiating Proceedings Upon Request

This article was suggested by the Thai authorities, and, like Article 1(6), is similar to a provision in Thailand's recent mutual legal assistance treaty with France. It is designed to deal with the situation in which the officials of one State determine from their investigation of a crime that prosecution of the offense by the authorities of the other State is more appropriate. For example, Thai investigators probing the illegal possession of narcotics in Thailand may learn that the narcotics were smuggled out of the country to the United States, and decide to ask the United States authorities to continue the investigation, turning over to the Drug Enforcement Administration such evidence as they have assembled.

The negotiators agreed, however, that in such a case the Requested States would not be obliged to actually prosecute the matter if the appropriate authorities there determine that it has no jurisdiction or that the case otherwise lacks merit. The last sentence of the first paragraph makes it clear that the authorities should decide the matter "in accordance with the laws" of the Requested State. Thus, the paragraph requires only that the Requested State make an objective decision whether to pursue the case. A judicial decision on the issue would satisfy this requirement, but is not mandatory, and a reasoned prosecutorial determination not to go forward with the case will suffice.

The second paragraph requires that the Requested State transmit, as appropriate, a copy of the decision reached with respect to the matter referred to it for prosecution under the first paragraph. This provision does not require that a copy of a formal judicial order, decision, or opinion be produced. Rather, a letter or other report from the Central Authority of the Requested State on the final disposition of the case would be enough.

Article 15 -- Assisting in Forfeiture Proceedings

A major goal of the treaty is to enhance the efforts of both the United States and Thailand in the war against narcotics trafficking. One significant strategy in that war is reflected in the efforts by United States authorities to seize and confiscate the money, property, and other proceeds of drug trafficking. One of the surest, most telling blows which can be struck upon a drug smuggling organization is to locate and confiscate the assets from which it pays its members and finances its future ventures, for these funds are the very lifeblood of the criminal conspiracy.

Article 15 is similar to Article 17 in the U.S.-Canada Treaty and Article 16 of the U.S.-Cayman Treaty. The first paragraph authorizes the Central Authority of one State to notify the other of the existence in the latter's territory of "fruits or instrumentalities" of a serious offense such as drug trafficking which may be forfeitable or subject to seizure. The term "fruits or instrumentalities of crime" was intended to include things such as money, vessels, or other valuables which are either being used in the crime or which were purchased or obtained as a result of the offense.

Upon receipt of notice under this article, the Central Authority of the State in which the objects are located may take whatever action is appropriate under the law in that State. For instance, if the assets in question are located in the United States and were obtained as a result of a fraud in Thailand, they could be seized in aid of a prosecution under 18 U.S.C. § 2314, or in anticipation of a civil action for the return of the assets to the lawful owner. If the assets are located in Thailand, we hope similar action could be taken pursuant to Thai law.

If the assets in question are the fruit of drug trafficking, Article 14 contemplates that the Contracting Parties will be especially willing to help one another. Recent legislation in the United States expands the authority of law enforcement officials to seize the proceeds of drug trafficking. One portion of the law -- Title 18, United States Code, Section 981(a)(1)(B) -- also allows the forfeiture to the United States government of property "which represents the proceeds of an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance (as such term is defined in the Controlled Substances Act) within whose jurisdiction such offense or activity would be punishable by death or imprisonment for a term exceeding one year and which would be punishable by imprisonment for a term exceeding one year if such act or activity had occurred within the jurisdiction of the United States." This is consistent with the laws in many other countries, such as Switzerland and Canada, and there is a growing trend among nations toward legislation of this kind in the

battle against narcotics trafficking.[30]

The second paragraph of Article 15 states that the parties to this treaty may aid one another in proceedings leading to the forfeiture of the fruits and instrumentalities of crime. The traditional rule was that no state is obliged to aid another in the execution of penal laws respecting enforcement of fines or forfeiure of criminal asset. However, this rule is gradually changing, at least where the foreign country's laws are designed to provide redress to the individual victim, or where the foreign country has already perfected its title to the assets it claims.[31] Moreover, any country is always free to assume a broader obligation than international law imposes on it when that country's authorities recognize that it is in the national interest to do so. In the second paragraph of Article 15, the parties to this treaty assume an obligation to aid one another, upon request, in proceedings leading to the forfeiture of illegally obtained assets, restoring illegally obtained funds or articles to their rightful owners, and the collection of fines imposed as sentences in criminal prosecutions.

Thus, if the law of the Requested State enables it to seize assets in aid of a proceeding in the Requesting State or enforce a judgement of forfeiture or fine in the Requesting State, the treaty authorizes and requires that it do so. The language of the provision is carefully selected, however, to not require either State to take any action which would go beyond the "the extent permitted by [its] laws." It does not mandate institution of forfeiture proceedings in either country against property identified by the other if the relevant prosecution authorities do not deem it proper to do so.

The new United States law also permits the Government to transfer an equitable share of certain forfeited property to other countries. Under regulations promulgated by the Attorney General, this equitable share will

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[30]See, e.g., the analysis and text of Article 3 of the United Nations Draft Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which calls for the signatory nations to enact broad legislation to forfeit illicit drug proceeds and to assist one another in such matters, as set out in A Report on the Status of the Draft, the U.S. Negotiating Position, and Issues for the Senate, S. Prt. No. 100-64, 100th Cong., 1st Sess., 6-11, 25-26 (1987).

[31]See, e.g., Mutual Assistance in Criminal Matters: A Commonwealth Perspective, prepared by Dr. David Chaikin and the Commonwealth Secretariat for the meeting of Commonwealth Law Ministers, Sri Lanka, February 14-18, 1985, at pages 32-34.

generally reflect the direct or indirect contribution of the foreign government in law enforcement activity which led to the seizure and forfeiture of the property. The new law requires that these provisions operate only "to the extent provided for by Treaty" and pursuant to "treaties providing for the transfer of forfeited properties to the foreign country," and the negotiators drafted Article 15 with wording broad enough to ensure that it would authorize and provide for such transfers. Thus, Article 15 will enable either party to transfer to the other forfeited assets, or the proceeds of their sale, to the other party to the extent permitted by their respective laws. It is anticipated that the terms of such transfers will be agreed upon through an exchange of diplomatic notes.

Article 16 – Appearance in the Requesting State

Article 16 provides that upon request the Requested State shall invite witnesses who are located in its territory and needed in the Requesting State to travel to the Requesting State to testify there if at all possible. An appearance in the Requesting State under this article is not mandatory, and the invitation may be refused by the prospective witness.

Of course, the Requesting State would be expected to pay the expenses of such an appearance, and the article specifically provides that the witness shall be informed of the amount and kind of allowances and expenses which the Requesting State will provide in a particular case. It is assumed that such expenses would normally include the costs of transportation, room, and board. When the witness is to appear in the United States, a nominal witness fee would also be provided. In Thailand, on the other hand, the normal practice is that fact witnesses are not provided with any compensation for testifying at trial.

Article 17 -- Safe Conduct

Article 17, like Article 27 of the United States-Swiss Treaty, provides that a person in the Requesting State to testify or for confrontation purposes under the treaty shall not be subject to service of process nor be arrested, detained, or subject to any restriction of personal liberty. This "safe conduct" is limited to acts or convictions which preceded the witness' departure from the Requested State. It is understood that this provision does not prevent the prosecution of a person for perjury or any other crime committed while in the Requesting State.

The applicability of this article to a person transferred under Article 11 is necessarily limited, since Article 11 requires that the witness be kept in custody unless the State from which he was transferred consents to his release.

The second paragraph states that the safe conduct provided in this article expires fifteen days after the person has been notified by the appropriate authorities that his presence is no longer required, or if he leaves the Requesting State and thereafter returns to it.

Article 18 -- Return of Documents and Articles

This short procedural article provides that any documents, records, or articles of evidence furnished under the treaty must be returned to the Requested State as soon as possible unless that State waives their return. This means that documents or items provided to the United States pursuant to a treaty request must be returned to Thailand once they are no longer needed here, unless the authorities in Thailand give permission for a different disposition. It is anticipated that unless original records or articles of some intrinsic value were provided, the Requested State will routinely waive return, but this is a matter best left to development of practice.

Article 19 – Compatibility with Other Treaties and National Laws

Article 19 states that assistance and procedures provided by this treaty shall not prevent or restrict assistance available under any other international agreements to which either of the Contracting States may be party, or through the provisions of its national laws. Thus, the treaty leaves undisturbed the provisions of United States and Thai law on the execution of letters rogatory, and does not alter preexisting agreements concerning investigative assistance, such as the Memorandum of Understanding on Cooperation in the Narcotics Field, signed at Washington September 28, 1971.[32] This is a standard provision in United States mutual legal assistance treaties.[33]

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[32] 22 UST 1587, TIAS 7185, 807 UNTS 49 (entered into force September 28, 1971).

[33] See, e.g., Article 16 of U.S.-Morocco Treaty and Article 21 of the U.S.-Colombia Treaty.

Article 20 – Ratification and Entry Into Force

The penultimate article contains standard language concerning the procedure for exchange of instruments of ratification and the coming into force of the treaty.

Article 21 -- Denunciation

The final article contains a standard provision concerning the procedure for terminating the treaty. Article 21 states that either State must give six months' notice to the other State of an intent to terminate the treaty. This requirement is not unusual in a treaty of this kind, and a similar requirement is contained in our treaties with Switzerland, Turkey, the Netherlands, Canada, and the Cayman Islands.

Senate of the United States

IN EXECUTIVE SESSION

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty between the Government of the United States of America and the Government of the Kingdom of Thailand on Mutual Assistance in Criminal Matters, signed at Bangkok on March 19, 1986.

ADDITIONAL VIEWS OF SENATOR JESSE HELMS

The major issue with respect to the Mutual Legal Assistance Treaty with Thailand is the protection of the constitutional rights of United States citizens.

Both the committee report and the administration's witnesses insist that the MLAT's are an effective means of obtaining legal assistance. The effectiveness comes in part from streamlining the process of obtaining justice. That is also the major problem associated with these treaties. The MLAT's change and challenge constitutional processes as they relate to individual rights under the Constitution.

No other country protects the rights and freedoms of U.S. citizens in the way that the U.S. Constitution does. The major protections are found in the Bill of Rights. Despite what the committee would have us believe, these protections deal not with substantive law but rather with process.

NEED FOR CONSTITUTIONAL RESERVATION

It is for this reason that I offered a reservation identical to the Lugar-Helms reservation on the Genocide Convention which was approved by 93 Senators in February 1986. This reservation reads:

> Nothing in this Treaty requires or authorizes legislation or other action by the United States prohibited by the U.S. Constitution as interpreted by the United States.

This reservation, if accepted, would be included in the instruments of ratification submitted to the other ratifying countries. Thereby, the constitutional rights of Americans would remain secure.

UNANSWERED QUESTION OF CONSTITUTIONAL PRIMACY

The essential reason for such a proviso is the still unanswered question of whether the Constitution supersedes a treaty or whether a treaty can be held to be of equal force to the Constitution with respect to its provisions.

There is a continuing dispute among scholars as to whether the Constitution always prevails within the territorial boundaries of the United States and in foreign lands. In support of her contention that the Courts have held the Constitution always to be supreme, the State Department witness could cite for the committee only one case: *Reid* v. *Covert* (1956), a case dealing with an executive agreement—not with a treaty. This important distinction was acknowledged by the State Department witness.

In *Reid,* the distinguished Supreme Court jurist John Marshall Harlan wrote in his concurring opinion that "I cannot agree with the suggestion that every provision of the Constitution must be

deemed automatically applicable to American citizens in every part of the world * * *. The proposition is, of course, not that the Constitution 'does not apply' overseas, but that there are provisions in the Constitution which do not necessarily apply in all circumstances in every foreign place."

Although *Reid* v. *Covert* (1957) is the most recent case on the Constitution and its relationship to treaties, there are other cases which have either introduced new law in their time or muddied the waters of what was then current law.

OTHER CASES

Oliver Wendell Holmes, Jr., in his majority opinion in *Missouri* v. *Holland* (1920), literally dispensed with the tenth amendment as it related to treaties. He does, however, pose a question which indicates that the issue of treaties versus the Constitution is not wholly resolved by the statement: "The treaty in question does not contravene any prohibitory words to be found in the Constitution."

Geoffroy v. *Riggs* (1890) stands for the proposition that "The treaty power as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the Government or of its Departments, and those arising from the nature of the Government itself. * * *" This is a generalized statement of *dicta* and obscures more than clarifies the relationship of treaties to the Constitution.

In *Hauenstein* v. *Lynham* (1880), the Court lumps the Constitution and treaties together, stating that they both are "part of the law of every state. * * *" In other words, both are the law of the land as expressed in Article VI of the U.S. Constitution.

In the landmark case of *Foster* v. *Nielson* (1829), the Supreme Court through the majority opinion of Chief Justice John Marshall held that treaties could be self-executing, though there was no precedent for this in U.S. law. The MLAT's are self-executing treaties, and it is not clear what constitutional restraints may be placed upon them.

In *Ware* v. *Hylton* (1796), Justice Cushing wrote that the treaty in question "is of equal force with the Constitution."

Needless to say, I wish that the Supreme Court had at some time conclusively determined that the Constitution is supreme in all cases. Since this determination has not been made, a reservation is necessary to assure that the constitutional rights of all Americans are not abridged by the execution of those treaties.

MEANS TO OBTAIN EVIDENCE

During consideration of the Genocide Convention in 1985, the Foreign Relations Committee adopted a reservation aimed at protecting the constitutional rights of Americans. Unless a similar reservation is attached to the treaty, the constitutional rights of Americans will unnecessarily be left at risk.

This treaty seeks to enhance national and international law enforcement interests and aims to overcome the alleged burdens placed upon governments attempting to control interstate criminality.

The treaty seeks to allow U.S. prosecutors to obtain some assistance from foreign countries in obtaining evidence, and other matters, of importance to prosecutions.

But this treaty also seeks to help foreign governments obtain evidence for their prosecutions. Other countries have different systems of law. And the Constitution of no other country protects the rights and freedoms of its citizens as does the United States Constitution.

Other countries could demand evidence from the United States that would not be admissible in our own courts under our Constitution. Or they could seek U.S. evidence relating to persons in their own countries just to see how much we know.

So, the question is this: Will this treaty unintentionally result in an infringement upon the constitutional rights and freedoms of American citizens?

As these treaties are currently drafted, we can be certain there will be a full-scale assault against American liberties. The group of lawyers most concerned with protecting the rights of U.S. citizens in courts abroad—the International Legal Defense Counsel—strongly opposed enactment of these treaties "as is" in hearing of the Senate Foreign Relations Committee.

The MLAT treaties will also help foreign governments obtain evidence for their prosecutions. But these same governments, some of which are corrupt (e.g. Mexico and the Bahamas), could demand evidence from the United States that would not be admissible in our own courts under the United States Constitution. They also could seek U.S. evidence relating to persons in their own countries just to see how much we know.

ADMINISTRATION FAILURE TO DEVELOP POSITION

The Principal Deputy Legal Adviser, Mary Mochary, in response to a question regarding the administration position on the constitutional issues raised by this treaty, failed to cite any original arguments and limited herself to reading from the majority report of the 100th Congress. Sadly, that report put forward the following specious arguments:

> (1) The U.S. Supreme Court regularly and in a number of cases asserted the supremacy of the Constitution over treaties.
>
> (2) None of the MLAT's requires or authorizes legislation which is prohibited by the Constitution.
>
> (3) If we reserve the rights of our Constitution, other governments will reserve the rights of their constitutions which are based on different legal systems.
>
> (4) The MLAT's do not require new grounds for legal process, but merely provide mechanisms for the obtaining of evidence.
>
> (5) The defendants under the MLAT's are not excluded from legal assistance—only from the use of the treaties.

None of these assertions is cogent, as may be surmised from the following rebuttal:

(1) The only Supreme Court case on the conflict between international agreements and the Constitution is *Reid* v. *Covert,* and the meaning of that case is ambiguous as to treaties rather than to executive agreements as already explained in more detail above.

(2) The MLAT's do not recognize certain Bill of Rights guarantees such as the right to counsel and the privilege against self-incrimination.

(3) The main purpose of a constitutional reservation is to prevent the imposition of other countries' legal systems into the U.S. Constitution-based American legal system.

(4) The mechansims provided by the MLAT's should be subject to the protections afforded by the U.S. Bill of Rights.

(5) The U.S. Government insists it needs the MLAT's because the method of letters rogatory is inadequate, but the Government also argues that letters rogatory—which it claims to be too slow and cumbersome—is good enough for defendants and others subject to the MLAT procedures.

For these reasons, I feel that if the MLAT treaties are to be approved, they must be subject to a reservation which would provide basic constitutional guarantees. Otherwise, they could subvert what Committee Report claims they are trying to protect.

JESSE HELMS.

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